

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MELISSA MARTINEZ-MORALES

Claimant

VS.

WAL-MART

Respondent

AND

AMERICAN HOME ASSURANCE CO.

Insurance Carrier

Docket No. 1,021,880

ORDER

Claimant requests review of the May 9, 2006 preliminary hearing Order For Independent Medical Examination entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

Following a preliminary hearing the Administrative Law Judge (ALJ) ordered the respondent to pay for an independent medical examination to be performed by Dr. Brown, so that it can be determined whether or not the claimant is in need of shoulder surgery related to her work accident. The ALJ also granted the respondent's request and terminated temporary total disability (TTD) compensation until the claimant is able to proceed with medical treatment for her work related injury.¹ Claimant is presently pregnant and due to deliver in mid-August 2006.

The claimant requests review of that portion of the ALJ's Order which terminates her TTD benefits during the balance of her pregnancy and the resumption of her medical treatment. Claimant argues that the ALJ violated federal law by suspending TTD benefits due to her pregnancy. And that by entering such an Order the ALJ exceeded her jurisdiction.

¹ ALJ Order (May 9, 2006).

Respondent argues that the Board does not have jurisdiction over this appeal as the sole issue presented deals with TTD, therefore the appeal should be dismissed. Alternatively, should the Board find it has jurisdiction, respondent contends the ALJ's order should be affirmed. Respondent contends that the claimant is being treated the same as any other claimant who suffers a medical condition, acquired after the injury and which is totally unrelated to the work injury, but prevents or delays the ability to undergo medical treatment or care from the treating physician.²

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant alleges a work-related injury to her shoulder that has been the focus of an earlier preliminary hearing and subsequent appeal to this Board. That claim has, at least up until this juncture, been found compensable and claimant was receiving medical treatment. Surgery to the shoulder was recommended, but claimant discovered she was pregnant. It is unclear from the record whether claimant is unwilling to proceed with the surgery, given her condition, or if it is the physician who is unwilling. Claimant did not testify at the preliminary hearing, but it is uncontroverted that the surgery recommended by the treating physician has not been done, nor is it presently scheduled. And there appears to be no dispute that claimant cannot work due to her injury.

Moreover, respondent offered additional evidence in the form of a physician's report which indicates claimant's present shoulder complaints could not have resulted from the mechanism of injury which she describes. However, the question of whether claimant's shoulder complaints arose out of and in the course of her employment is not an issue presented in this appeal. Rather, the sole issue is whether the ALJ exceeded her jurisdiction in terminating claimant's TTD benefits under these facts.³

The claimant argues that the ALJ exceeded her jurisdiction in terminating benefits because this decision violates federal law, specifically the Pregnancy Discrimination Act, 42 U.S.C. 2000e-2(a)(1). She also suggests that by ordering termination of the TTD benefits "the trial court added a violation of 42 U.S.C. 1983 since the Court's order is state sanctioning of a violation of [c]laimant's federal civil rights."⁴ Claimant also likens the ALJ's

² Respondent's Brief at 5 (filed Jun. 12, 2006).

³ Claimant's Application for Review frames the issue as stated above, but in her brief to the Board, she frames it somewhat differently. There she states the issue as follows: "When a claimant is unable to work due to a work-related injury, and medical treatment is delayed because of her pregnancy, does an order terminating TTD benefits until after a woman's pregnancy is over violate federal law?". Claimant's Brief at 2.

⁴ Claimant's Brief at 3 (filed May 31, 2006).

decision to terminate benefits as one that goes against “the orders of the various ALJs concerning the payment of TTD during an injured employee’s weight loss program which has to be undertaken so that the injured employee can go through surgery. Sanctioning Judge Fuller’s order in the present case would result in unequal treatment of pregnant women and obese men.”⁵

Respondent contends that not only is there no jurisdiction for the Board to consider this appeal, even if there were, claimant’s arguments are misplaced. Any violation of federal law has its own set of procedures and are to be heard in an entirely different forum.

K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee’s employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.⁶

Contrary to respondent’s contention, the Board finds that the central dispute in this appeal is not whether claimant is temporarily and totally disabled as that fact is apparently not in dispute. Rather, the dispute is whether claimant’s present status as temporarily and totally disabled is caused by her work-related accident. Stated another way, the issue is whether her present status arose out of and in the course of her employment. Thus, the Board does have jurisdiction to hear this matter.

Turning now to the substantive issue at hand, the Board finds claimant is entitled to the monetary benefits she seeks. Her pregnancy has interrupted her care but in no way relieves respondent of its duty to provide benefits under the Act. There is no dispute that she is unable to work due to her injury and she is, therefore, entitled to benefits until such time as she is found to be able to return to work. Accordingly, the ALJ’s preliminary

⁵ *Id.* at 3-4.

⁶ See K.S.A. 44-551.

hearing Order is reversed and claimant is entitled to TTD benefits at the rate agreed upon by the parties and commencing March 11, 2005 and continuing less any days actually worked, until further order or until certified as having reached maximum medical improvement, or released her to a regular job, or becomes re-employed whichever comes first.

WHEREFORE, it is the finding, decision and order of the Board that the appeal of the Order of Administrative Law Judge Pamela J. Fuller dated May 9, 2006, is reversed and claimant is granted TTD benefits commencing March 11, 2005.

IT IS SO ORDERED.

Dated this _____ day of August, 2006.

BOARD MEMBER

c: Matthew L. Bretz, Attorney for Claimant
Kendall R. Cunningham, Attorney for Respondent and its Insurance Carrier